Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

Disclosure of Network Management Practices	)	GN Docket No. 09–191
Preserving the Open Internet and Broadband Industry Practices	)	WC Docket No. 07–52

COMMENTS OF THE UNITED STATES TELECOM ASSOCIATION

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The United States Telecom Association ("USTelecom")[1] hereby responds to the Federal Communications Commission's ("Commission" or "FCC") notice seeking comment on the Paperwork Reduction Act ("PRA") implications of the information collection requirements in its *Net Neutrality Order*.[2] These information collection requirements – which emanate from the Commission's "transparency" rule – violate the PRA, the primary purpose of which is "to reduce, minimize and control burdens and maximize the practical utility and public benefit" of information collected by the Federal Government.[3]

To assist the Commission in its internal review of the information collection, USTelecom points out three ways that the proposed information collection runs afoul of the PRA. First, the

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[1] USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data, and video over wireline and wireless networks.

[2] *See Notice of Public Information Collection Being Reviewed by the Federal Communications Commission, Comments Requested*, 76 Fed. Reg. 7207 (Feb 3, 2011) ("*PRA Notice*"); *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, GN Docket No. 09-191; WC Docket No. 07-52, FCC 10-201 (Dec. 23, 2010) ("*Net Neutrality Order*").

[3] 5 C.F.R. § 1320.1.

Commission severely underestimated the burden associated with collecting, reviewing, and disclosing the information in question. The Commission's estimates of the time and cost involved – an average of 10.3 hours and zero "external costs" per respondent – are not accurate. Indeed, the Commission arbitrarily reduced its estimate of the burden of the information collection requirements embodied in its final rules as compared to the initial rules proposed one year earlier, even though the information collection regime established in the final rules is demonstrably more burdensome by virtue of the Commission's expanding the scope of the topics that must be disclosed, increasing the universe of entities to which the disclosures must be made, and requiring that disclosures be made at all points of sale.

Second, the Commission failed to demonstrate that the proposed information collection will have practical utility for the Commission and the public that outweighs the significant burdens. In essence, the Commission purports to require broadband providers to collect, review and disclose potentially voluminous amounts of information, even though the Commission appears to have no process or intent to use the information.

Third, the Commission made no attempt to reduce the burden of the information collection on small business entities, as required by the PRA. While the Commission purports to give "flexibility" to all broadband providers in collecting, reviewing, and disclosing the required information, such flexibility is not a panacea to the burden the Commission's information collection requirements would impose on small business entities.

The Commission's analysis of the PRA implications of its proposed information collection requirements is seriously flawed. The Commission seeks to impose information collection requirements on the broadband industry without taking into account the actual burdens

of those requirements, without assessing their practical utility, and without accommodating the legitimate interests of small business entities. Such an approach violates the PRA.[4]

I. THE COMMISSION'S PRA ANALYSIS SEVERELY UNDERESTIMATES THE BURDENS RESULTING FROM ITS PROPOSED INFORMATION COLLECTION.

The PRA is a critical part of the regulatory process, enabling federal agencies to fully appreciate and weigh the burdens and benefits of information collections on industry and the public.[5] The analysis is essential to ensuring that the central purpose of the PRA – to "*minimize the paperwork burden*" for reporting entities – has been met.[6]

Rather than minimizing the paperwork burden on the broadband industry, the Commission's proposed information collection requirements would have the opposite effect. The proposed information collection requirements stem from the *Net Neutrality Order's* "transparency" rule, which mandates that fixed and mobile broadband Internet access service providers "publicly disclose accurate information regarding … [their] broadband Internet access services sufficient for consumers to make informed choices regarding use of such services and for content, application, service, and device providers to develop, market, and maintain Internet offerings."[7]

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[4] At this stage in the PRA review process, the Commission is tasked with, among other things, "[e]valuat[ing] whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility" and "[e]valuating the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used." 5 C.F.R. § 1320.8(d)(1)(i),(ii).

[5] The stated purposes of the PRA include: (1) minimizing the burden of federal paperwork on individuals, small businesses, state and local governments, and others; (2) ensuring the greatest public benefit from federal information; (3) coordinating federal information resources management policies; and (4) improving the quality and use of federal information. 44 U.S.C. § 3501(1).

[6] 44 U.S.C. § 3501(1) (emphasis added).

[7] *Net Neutrality Order* at Appendix A, Rule § 8.3.

In furtherance of the Commission's "transparency" rule, the text of the *Net Neutrality Order* identifies approximately 30 discrete topics, "some or all" of which "likely" must be addressed in order for a broadband provider's disclosures to be deemed "effective."[8] These suggested disclosures are grouped into the following categories: (i) network practices (including congestion management, application-specific behavior, device attachment rules, and security); (ii) performance characteristics (including service description and impact of specialized services); and (iii) commercial terms (including pricing, privacy policies, and redress options). According to the Commission, however, its list of "likely" disclosures is not "exhaustive," nor does it constitute a "safe harbor."[9] Instead, broadband providers are directed to "examine their network management practices and current disclosures to determine what additional information, if any, should be disclosed to comply with the rule."[10]

Additionally, the *Net Neutrality Order* requires that information be "timely and prominently disclosed in plain language accessible to current and prospective end users and edge providers, the Commission, and third parties."[11] This requirement likely will be difficult and costly to implement as a broadband service provider's disclosures currently are directed toward consumers and provided in non-technical terms. Broadband providers frequently have no relationship with edge providers, which may require disclosures that are considerably more technical in nature.[12]

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8 *Id*. at ¶ 56.

9 *Id*.

10 *Id*.

11 *Id*.

12 *Net Neutrality Order* at ¶ 53 (anticipating that disclosures will ensure that "edge providers have the technical information necessary to create and maintain online content, applications, services, and devices, and to assess the risks and benefits of embarking on new projects").

The *Net Neutrality Order* also requires, at a minimum, that broadband providers "prominently display or provide links to disclosures on a publicly available, easily accessible website…"[13] Broadband providers also must disclose information collections at "point[s] of sale,"[14] a term not defined but which could include all brick-and-mortar retail stores, sales kiosks, and every other sales channel, including, but not limited to, telephone calls between a potential customer and a broadband provider's customer service representative. Additionally, the Commission, at any point, "may require additional disclosures directly to the Commission."[15]

A. <u>The Commission's Burden Estimates Are Flawed</u>.

In assessing the burden of the proposed information collection,[16] the Commission estimated that it would take a broadband provider an average of 10.3 hours annually to collect, review, and disclose the requisite information at no "external cost." These estimates are significantly understated, and the Commission must employ a more realistic estimate of the burdens during its internal review.

At the outset, the Commission's burden estimates are based on the "belie[f]" that "most broadband providers already disclose most, and *in some cases all*, of the information required to comply with the rule."[17] It is certainly true that broadband providers routinely disclose relevant

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13 *Id*. at ¶ 57.

14 *Id*.

15 *Id*.

16 The term "burden" is broadly defined to include all of the "time, effort, or financial resources expended by persons to generate, maintain, or provide information to or for a Federal agency." 44 U.S.C. § 3502(2). The burden-hour estimate for an information collection is a function of (1) the frequency of the information collection, (2) the estimated number of respondents, and (3) the amount of time that the agency estimates it takes each respondent to complete the collection.

17 *PRA Calculations for Disclosure of Network Management Practices, Preserving the Open Internet and Broadband Industry Practices Report and Order*, GN Docket No. 09-191; WC Docket No. 07-52, Public Information, at 1 (2011) (emphasis added) ("*2011 PRA Calculations*").

consumer information regarding their broadband services, including, but not limited to, information about commercial terms, privacy policies, and consumer compliant procedures. Indeed, broadband providers are continually updating their consumer disclosures in order to respond to marketplace developments and the needs of their customers.[18]

However, it is clear that broadband providers do not routinely disclose information regarding all of the approximately 30 topics identified in the *Net Neutrality Order*. A good example is information regarding actual broadband speeds. Just two months ago, the Commission released the *Form 477 NPRM* that sought comment on proposed modifications to its Form 477, including a proposal that the Commission collect "information about actual speeds by geographic area" and "how to best measure the actual speeds of services that can be provided over a network."[19] In so doing, the Commission acknowledged the technical and logistical hurdles associated with broadband providers collecting and reporting actual speed data.[20] Given this acknowledgment, the Commission's PRA analysis is clearly flawed when it assumes that broadband providers are already disclosing information regarding actual broadband speeds.

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[18] To the extent the information that is the subject of the Commission's proposed information collection is already available, the Commission may be unable to certify properly the proposed information collection to OMB. *See Notice of Office of Management and Budget Action*, ICR Reference Number 200802-3060-019 (November 28, 2008). Specifically, Section 3506(c)(3) requires that the Commission "certify (and provide a record supporting such certification, including public comments received by the agency) that each collection of information submitted . . . is not unnecessarily duplicative of information otherwise reasonably accessible to the agency." 44 U.S.C. § 3506(c)(3)(B). In certifying its paperwork request with OMB, the Commission must not only describe efforts to identify duplication, it must also demonstrate specifically why any similar information already available cannot be used or modified for the intended purposes. *See* Memorandum for the President's Management Council, *Guidance on Agency Survey and Statistical Information Collections*, January 20, 2006, p. 98 (available at: http://www.whitehouse.gov/sites/default/files/omb/inforeg/pmc_survey_guidance_2006.pdf).

[19] *In the Matter of Modernizing the FCC Form 477 Data Program*, Notice of Proposed Rulemaking, WC Docket No. 11-10, FCC 11-14, ¶ 59 (2011) ("*Form 477 NPRM*").

[20] *Id*. (noting "the difficulty of measuring actual speeds" and the claim by "[b]roadband providers and their industry associations … that measuring speed will be "almost impossible").

Indeed, as the *Form 477 NPRM* makes clear, numerous questions remain unanswered about how a broadband provider should even go about determining "actual" broadband speed.[21] The "actual" speed that a particular customer experiences at any time is a function of myriad factors, many of which are beyond the broadband provider's control. Such factors include the quality of the wiring at the consumer's premises, the computer and networking equipment used by the consumer, the software and applications currently being run by the consumer, general Internet congestion and the responsiveness of the particular servers and networks the customer seeks to access, as well as many technology-specific factors, including how many other subscribers are using the same shared facilities (*e.g.*, cable modem), the consumer's distance from the provider's facilities (*e.g.*, DSL), atmospheric conditions (*e.g.*, satellite), and the capabilities of subscriber-purchased devices (*e.g.*, wireless devices).

In its National Broadband Plan, the Commission found that consumers "have little information about the actual speed and performance of the service they purchase."[22] Accordingly, the Plan recommended that the Commission, in consultation with the National Institute of Standards and Technology, "determine the technical standards and methodology to measure performance of fixed broadband connections with the objective of giving consumers a more accurate view of their broadband service."[23] But the Commission has yet to act on this recommendation. Given this, it is arbitrary and capricious for the Commission's PRA analysis to

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[21] *Id.* (seeking comment on proposals to report actual speeds based on "a statistical sampling of average speeds" or to require "providers to report data contention ratios (the ratio of the potential maximum demand to the actual bandwidth available)").

[22] *See* FCC, *Connecting America, The National Broadband Plan*, at 44 (rel. March 16, 2010) ("Plan").

[23] *Id.* at 45 (Recommendation 4.3).

conclude that broadband providers are disclosing actual broadband speeds in the absence of any guidance from the Commission on the subject.

In addition to actual broadband speed, as far as USTelecom is aware, its member companies do not routinely disclose "latency" information, "security" practices, or other technical information that may be required under the "transparency" rule, which may prove especially burdensome to collect and report in a user-friendly fashion. Nor are USTelecom members making disclosures for the specific benefit of "content, application, service, and device providers to develop, market, and maintain Internet offerings," as would now be required by the Commission. Because they typically do not have any relationship with so-called edge providers, broadband providers will be hard pressed to determine what "technical information" edge providers need "to create and maintain online content, applications, services, and devices, and to assess the risks and benefits of embarking on new projects."[24]

Furthermore, even if broadband providers were disclosing all of the required information today on a voluntary basis, considerable differences likely exist in the rigor associated with voluntary versus mandated disclosures. A broadband provider undoubtedly would devote significantly greater resources to ensuring that its disclosures comply with all applicable legal requirements – resources that are not being expended today.

Whatever information is currently being disclosed today, the Commission has underestimated substantially the time and resources needed to design and implement the proposed information collection. According to the Commission's estimate, the collection will require, on average, 10 engineer hours, 5 technical writer hours, and 2 attorney hours in the first

[24] *Net Neutrality Order* at ¶ 53.

year and 5 engineer hours, 1 technical writer hour, and 1 attorney hour in subsequent years.[25] The Commission also determined that compliance with the information collection requirements would not involve any "external costs" because, according to the Commission, the requirements "will be met by respondents' 'in-house' staff."[26] These estimates cannot be reconciled with the reality of the burdens associated with the Commission's proposed information collection. Indeed, given the expansive scope and open-ended nature of the disclosure requirements, it will take considerably longer than the minimal time estimated by the Commission merely for a broadband provider to determine what information should be disclosed.

In determining the burden associated with a particular information collection, the Commission is required to consider the time, effort, and cost required to train personnel to be able to respond to the collection; to acquire, install, and develop systems and technology to collect, validate, and verify the requested information; to process and maintain the required information; and to provide the required information.[27] None of these tasks are reflected accurately in the Commission's burden estimates.

At the outset, broadband providers will be required to invest significant time, resources, and personnel to design and implement a compliant information collection and reporting process —a process made much more difficult by the ambiguous nature of the Commission's transparency requirements. As noted above, the Commission lists approximately 30 discrete topics that a broadband provider's disclosures should likely address. But absent a safe harbor or any regulatory certainty regarding the scope of level of detail of the mandated disclosures,

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25 *2011 PRA Calculations* at 1-2.

26 *Id*. at 2.

27 5 C.F.R. § 1320.3(b)(1).

broadband providers are left to wonder whether each of the topics actually must be addressed and, if so, the specificity required, as well as whether any additional issues not identified by the Commission also should be disclosed.

In order to undertake this analysis, broadband providers will need to engage a wide range of personnel—including engineers, network managers, regulatory advisors, in-house and outside counsel, technical writers, marketing, and other employees—to evaluate what information should be reported, how the information should be collected and formatted, and how such information should be publicly disclosed. All told, just *designing* an information collection and reporting program will take considerably longer than 10 hours and cost considerably more than nothing, as estimated by the Commission.

After the initial design of an information collection process, broadband providers will need to invest substantial resources to execute the collection and reporting program. First, employees—including network operators, engineers, and marketing and sales employees—will need to monitor and compile the information to be disclosed.[28] Second, the broadband provider's legal staff and regulatory personnel, as well as members of the company's management team, will need to review the proposed disclosures to determine whether such disclosures are required or otherwise appropriate.[29] Third, once a decision is made to disclose particular information, technical writers, attorneys, and other personnel will need to collaborate to translate the information—which may be technically complex and voluminous—into a user-friendly format. Finally, the broadband provider will need to upload the information to its

[28] The term "burden" includes "resources expended" for "searching data sources." 44 U.S.C. § 3502(2)(D).

[29] The term "burden" includes "resources expended" for "completing and reviewing the collection of information." 44 U.S.C. § 3502(2)(E).

website and distribute the information to all "points of sale," a term not defined but which, as noted above, could include all brick-and-mortar retail stores, sales kiosks, and every other sales channel, including, but not limited to, telephone contacts between customers and a broadband provider's customer service representatives.[30] Importantly, each employee involved in this multi-step process must be trained on a regular basis in order to implement the information collection process efficiently and accurately on an ongoing basis.[31] The notion that all of these activities could be accomplished in slightly more than 10 hours and entail zero "external costs" unfortunately is not true.

To illustrate the burdens of its proposed disclosures, the Commission need look no further than the time and costs required to provide disclosures when a broadband provider's customer service representative speaks with a potential broadband customer on the telephone. Because a telephone contact during which broadband service may be sold presumably is a "point of sale" for purposes of the Commission's "transparency" rule, a broadband service provider would be required to develop scripts for use by its customer service representatives to ensure compliance with that rule. Such scripts may involve advising customers that the broadband services are subject to the terms and conditions specified online (assuming this approach complies with the Commission's rules) or providing information regarding the various disclosures over the telephone. In the latter instance, the script for use by customer service representatives when selling broadband service would be lengthy and take considerable time to read given the expansive nature of the disclosures. The resources required to develop and update

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[30] The term "burden" includes "resources expended" for "transmitting, or otherwise disclosing the information." 44 U.S.C. § 3502(2)(F).

[31] The term "burden" includes "resources expended" for "reviewing instructions." 44 U.S.C. § 3502(2)(A).

this script, not to mention the cost of conducting initial and ongoing training to ensure that customer service representatives follow that script, would be substantial.[32]

Furthermore, the burdens associated with the proposed information collection are compounded by the frequency of reporting – an issue the Commission's estimates also overlook. Instead of adopting an annual or quarterly reporting requirement, the Commission simply noted—without explanation—that reporting must be "timely."[33] This "timely" requirement could be construed as an ongoing obligation to modify the required disclosures whenever changes are made in the various areas subject to disclosure.

To take but one example, the Commission's *Net Neutrality Order* suggests that a broadband provider should disclose "practices used to ensure end-user security or security of the network, including types of triggering conditions that cause a mechanism to be invoked," unless the provider determines that such information "could reasonably be used to circumvent network security," in which case disclosure is not required.[34] Broadband providers are increasingly integrating security capabilities and technologies into their broadband services so they can prevent and respond to various security threats, including spam and malware. Security measures are implemented frequently, sometimes on a weekly or even daily basis, depending upon the

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[32] Mandatory disclosures made over the telephone pursuant to the Commission's "transparency" rule could become the equivalent of the equal access scripts that incumbent local exchange carriers historically used to inform customers calling to obtain new local exchange service about their long distance service alternatives – a scripting requirement from which the Commission granted forbearance to the Bell Operating Companies four years ago. *See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements; 2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of the Commission's Rules; Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) with Regard to Certain Dominant Carrier Regulations for In-Region, Interexchange Services*, Report and Order and Memorandum Opinion and Order, 22 FCC Rcd 16440 (2007).

[33] *Net Neutrality Order* at ¶ 57.

[34] *Id.* at ¶ 56.

level and nature of the network threats.[35] Every time a broadband provider implements a new security measure, it must determine: (i) whether that particular measure is subject to the Commission's transparency rule; (ii) if so, whether the measure should be disclosed or whether disclosure should be withheld because the information "could reasonably be used to circumvent network"; and (iii) if the information must be disclosed, what level of detail is required.

The Commission's estimates of the burdens associated with the proposed information collection requirements in the *Net Neutrality Order* are inaccurate, and the Commission should increase significantly those estimates during its upcoming internal review.

B. The Commission Arbitrarily Reduced Its Burden Estimates While Simultaneously Expanding The Applicable Disclosure Obligations.

That the Commission has significantly underestimated the burden of the proposed information collection requirements is evident from its initial PRA analysis conducted in connection with the *NPRM*. When it initially proposed net neutrality (or Open Internet) rules in 2009, the transparency requirements on which the Commission sought comment were very limited. The disclosures proposed in the *NPRM* dealt generally with "network and congestion practices," and the Commission's proposals did not include any purported requirement to disclose such matters as security measures, pricing data, privacy policies, device attachment rules, specialized services, and the like.

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[35] In the current Internet ecosystem, broadband providers can confront potential threats—especially "zero day attacks"—on a daily basis. "Zero-day" attacks occur during the vulnerability window that exists in the time between when a vulnerability is first exploited and when software developers start to develop a counter to that threat. For viruses, Trojans, and other zero-day attacks, the vulnerability window follows this timeline: the developer creates software containing an (unknown) vulnerability; the attacker finds the vulnerability before the developer does; the attacker writes and distributes an exploit while the vulnerability is not known to the developer; and the developer finds the vulnerability and starts developing a fix. This is an ongoing process, and rather than focusing solely on stopping the potential threat, a broadband provider will be required to consider the implications of the Commission's transparency rule.

Despite the relatively limited nature of the information collection proposed in the *NPRM* in 2009, the Commission estimated the burden of the proposed collection requirements on the industry to be 546,840 hours at a cost of $4,687,000. Based on 1,674 broadband Internet access service providers, this translated to an average annual burden of approximately 327 hours and an average annual cost of $2,800 per provider.[36] While these estimates were seriously understated as well, it is impossible to reconcile these estimates with the Commission's calculation of the burdens associated with proposed information collection in the *Net Neutrality Order*.

First, the Commission's initial burden estimates of the information collection proposed in the *NPRM* assumed that "disclosures of network management practices will be done over the Internet." However, the proposed information collection in the *Net Neutrality Order* mandates disclosures at the "point of sale," the associated burdens of which the Commission did not consider in either its initial or current burden estimates.

Second, the Commission's initial burden estimates of the information collection proposed in the *NPRM* assumed that broadband providers would disclose information quarterly, since the Commission "doubt[ed]" that many providers would choose to change their network management practices more "frequently." However, the proposed information collection in the *Net Neutrality Order* requires "timely" disclosure of information, which could occur more frequently than quarterly, the associated burdens of which the Commission did not consider in either its initial or current broadband estimates.

Third, the Commission's calculation of the "annual cost" of the information collection as initially proposed in the *NPRM* – which the Commission estimated to be $4,687,000 on an

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[36] "Part 8: Disclosure of Network Management Practices," Federal Communications Commission, New Collection Supporting Statement, filed with the Office of Management and Budget, at 1 (Nov. 2009) ("*2009 FCC Supporting Statement*").

industry-wide basis – is premised upon flawed assumptions.[37] The $4,687,000 "annual cost" reflects the cost to "develop, test, and deploy a system to measure actual (rather than advertised) transmission rate and capacity" of a broadband provider's services. Putting aside the problems with this particular estimate, the Commission also concluded that compliance with the information collection as initially proposed would entail "in-house" costs of $32,698,577. However, the Commission disregarded these in-house costs in its calculations, apparently based on the assumption that broadband providers have a significant surplus of labor and technology that can be devoted to information collection without any real cost to their operations.

In short, the Commission's initial burden estimates of the information collection requirements proposed in the *NPRM* were premised on a less onerous information collection regime – that is, a more limited set of disclosures that only had to be made quarterly and only via a broadband provider's website. By contrast, the proposed information collection in the *Net Neutrality Order* purports to require a wider range of information that must be disclosed, contemplates disclosures that may occur more frequently than quarterly, and mandates that disclosures be made at the "point of sale" in addition to on the provider's website. Thus, one would reasonably expect the burden estimates of the information collection in the *Net Neutrality Order* to be higher than the Commission's initial estimates in 2009.

However, that is not the case. Instead, in calculating the burden on the industry from the proposed information collection in the *Net Neutrality Order*, the Commission arbitrarily reduced

[37] As a threshold matter, the Commission's calculations of costs–including engineer and attorney time–are based on federal government employee wage scales, which may or may not bear any resemblance to costs in the private sector.

its estimate of the industry-wide burden from 546,840 hours to 15,885 hours and the industry-wide cost from $4,687,000 to zero.[38]

The Commission did not explain this dramatic reduction in its burden estimates. Indeed, the Commission's current burden estimates do not mention, let alone attempt to reconcile, its initial estimates provided to OMB in 2009.[39] The Commission significantly expanded the scope of the disclosures under the final "transparency" rule by: (i) identifying in the *Net Neutrality Order* at least 30 topics that a provider's disclosures should address; (ii) including edge providers and third parties in addition to consumers as those to whom disclosures must be made; and (iii) requiring that disclosures be made at all points of sale in addition to via the provider's website. Despite these changes between the proposed and final rules – all of which increased the burdens on broadband service providers – the Commission inexplicably reduced its burden estimates.

C. The Commission Failed to Minimize the Burden of the Information Collection.

The Commission did not adequately "reduce, minimize and control [the] burdens" associated with the proposed information collection, as required by the PRA.[40] Instead, the Commission listed approximately 30 topics that broadband providers should consider including in their disclosures, while at the same time making clear that still more, currently-undefined disclosures may be required.[41] Under the Commission's proposed information collection, a broadband provider's disclosures could address each of the approximately 30 topics identified by

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38 *2009 FCC Supporting Statement* at 4; *2011 PRA Calculations* at 2.

39 For example, the Commission originally assumed that the industry would incur an average of $4,687,200 in external costs for "additional server space, memory, communications, and backup/recovery service associated with measurement report and disclosure." *2009 FCC Supporting Statement* at 4. When the Commission revisited its cost calculations in 2011, these external costs disappeared without explanation. *2011 PRA Calculations* at 2.

40 5 C.F.R. § 1320.1.

41 *Net Neutrality Order* at ¶ 56.

the Commission, only to find its disclosures subject to challenge because they allegedly should have included additional topics not identified by the Commission or they allegedly contained an inadequate level of detail.

Such an open-ended approach to meeting inherently amorphous disclosure obligations was not the Commission's only option. Rather, it could have adopted a safe harbor that would insulate a broadband provider from challenge if its disclosures contain a minimum level of specificity. Alternatively, the Commission could have narrowly tailored the disclosure obligations to relate directly to the substantive rules it was adopting rather than including general reporting obligations that are being addressed elsewhere. The Commission's failure to adopt, let alone even consider, these less burdensome alternatives is contrary to the PRA. Indeed, OMB has previously rejected collections that "fail[] to take the least burdensome approach possible for the collection's intended purpose."[42] During its upcoming internal review process, the Commission should evaluate if there are any ways to lessen the burden of the information collection without undercutting the goals of the *Net Neutrality Order*.

II. THE PROPOSED INFORMATION COLLECTION WILL HAVE LITTLE OR NO PRACTICAL UTILITY TO THE COMMISSION AND THE PUBLIC.

In addition to the substantial burdens associated with the proposed information collection, the information that broadband providers are expected to collect will have little or no practical

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[42] *See Notice of Office of Management and Budget Action*, ICR Reference No. 199607-1880-002, at 1 (Sept. 23, 1996) (OMB disapproved an information collection relating to Human Subjects Research submitted by the Department of Education because it "fail[ed] to take the least burdensome approach possible for the collection's intended purpose."). In another example of the Commission's failure to minimize the burden of a proposed information collection, OMB disapproved the FCC's proposal to reduce from fifteen days to three days the time in which cable TV system operators would need to respond to requests from potential programmers for leased access information. OMB concluded that the FCC failed to demonstrate that it had "taken reasonable steps to minimize the burden on respondents who will be required to hire new staff in order to maintain the capacity to comply with the reduced deadline for leased access requests." *See Notice of Office of Management and Budget Action*, ICR Reference Number 200804-3060-012, OMB Control No. 3060-0568, at 1-2 (July 9, 2008).

utility to the Commission and the public. The PRA defines "practical utility" as "the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion."[43] OMB's rules clarify that "practical utility means the actual, not merely the theoretical or potential, usefulness of information."[44] The rules also require that an agency establish a "plan for the efficient and effective management and use of the information to be collected."[45]

The requirement that a proposed information collection have actual practical utility is not merely aspirational. In multiple decisions, OMB has disapproved of information collections because the agency failed to demonstrate the "practical utility" of the collection in question. For example, OMB recently disapproved of the Commission's information collection requirement that would have required wireline and wireless carriers to maintain emergency backup power for their communications networks. OMB concluded that the Commission failed to "demonstrate[], given the minimal staff assigned to analyze and process this information, that the collection ha[d] been developed by an office that ha[d] planned and allocated resources for the efficient and effective management and use of the information collected."[46] Further, OMB noted that the "non-standardized format"[47] of the collection and "lack of sufficient clari[ty] on how respondents are to satisfy compliance"[48] also limited the collection's practical utility. Similarly, OMB disapproved an Environmental Protection Agency ("EPA") information collection because the

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43 44 U.S.C. § 3502(11).

44 5 C.F.R. § 1320.3(l).

45 5 C.F.R. § 1320.8(a)(7) (calling upon the agency to provide for a "plan for the efficient and effective management and use of the information to be collected.").

46 *See Notice of Office of Management and Budget Action*, ICR Reference Number 200802-3060-019, at 1 (November 28, 2008) (citing 44 U.S.C. § 3506(c)(3)(H)).

47 *Id*. (citing 44 U.S.C. § 3506(c)(3)(A); 5 C.F.R. § 1320(5)(d)(1)).

48 *Id*. (citing 44 U.S.C. § 3506(c)(3)(C)).

agency's "practical utility" showing was not commensurate with the burden of the collection. According to OMB, "[b]efore EPA undertakes such a large information collection (130,000 hours were requested for the screener survey alone), it must document the need for additional regulations."[49]

Here, the Commission has similarly failed to justify that its proposed information collection will have any practical utility that justifies the immense burden it will impose on broadband providers. First, the Commission has not developed a plan to process the information it receives in a "timely and useful fashion," and it apparently has no intention of devoting the necessary resources to do so. For example, the "supporting statement" provided by the Commission to OMB in connection with the information collection proposed in the *NPRM* concluded that the costs to the government of that information collection would be relatively minimal ($208,815 annually on average) because very little government time would be spent reviewing the information being disclosed (3,348 hours annually on average).

Importantly, the proposed information collection in the *Net Neutrality Order* covers a wide range of categories, including congestion management, application-specific behavior, device attachment rules, security, service descriptions, impact of specialized services, pricing, privacy policies, and redress options. Additionally, the information will be disclosed in a variety of different formats to a variety of different audiences that will make monitoring even more difficult, even assuming the Commission were inclined to do so. And, considering the extreme burden of the proposed information collection on broadband providers, as described above, the Commission should revisit how it will process and use the information being collected.

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[49] *See Notice of Office of Management and Budget Action*, ICR Reference No: 199805-2040-001, at 1 (Sept. 11, 1998).

Second, the Commission's failure to address the uses to which it will put the information being collected is especially problematic given the relatively short shelf-life of much of the information being disclosed. Topics such as security practices and pricing information change frequently, and without the resources to process this information on an ongoing basis, the burden imposed by the Commission on broadband providers to report this information may be for naught.

Finally, the Commission has not documented any need for the litany of disclosures unrelated to the substantive rules that were the subject of the *Net Neutrality Order*. Specifically, the *Net Neutrality Order* does not identify any harms—speculative or otherwise—that the disclosure of "security practices," "actual access speed and latency," the impact of "specialized services," "privacy policies," and the like would purport to remedy. At bottom, it appears that the Commission is purporting to require the disclosure of information just for disclosure sake, even though the information in question will have little or no practical utility to the Commission or the consuming public – an outcome contrary to the PRA.

III. THE FCC IGNORED ITS MANDATE UNDER THE PRA TO MITIGATE THE BURDEN OF THE PROPOSED INFORMATION COLLECTION ON SMALL ENTITIES.

The Commission's proposed information collection also violates the PRA because the agency failed to reduce the burdens of the collection requirements on small entities. The PRA requires that an agency certify to OMB that the proposed information collection reduces the paperwork burden to the extent practicable "with respect to small entities."[50] To satisfy this requirement, an agency may: (i) establish differing compliance or reporting requirements or timetables for smaller and larger respondents; (ii) clarify, consolidate, or simplify compliance

[50] 44 U.S.C. § 3506(c)(3)(C).

and reporting requirements; or (iii) exempt smaller carriers from coverage of any parts of the information collection.[51] Here, the Commission did not adopt, or appear to even consider, any of these alternatives.

That the Commission failed to reduce the burdens of the proposed information collection requirements on small business entities is evident from the *Net Neutrality Order*, which fails to make any distinctions based on the broadband provider's size. The Commission asserts that "any burden on small businesses will be minimal" because "the rule gives broadband Internet access service providers flexibility in how to implement the disclosure rule."[52] But this assertion is not persuasive. As noted above, the Commission provides this apparent "flexibility" to all broadband providers, large and small.[53]

The only additional explanation offered by the Commission in an attempt to demonstrate that the proposed information collection reduces the paperwork burden to the extent practicable with respect to small entities is equally unconvincing. For example, in 2009, the Commission advised OMB that the burden on small entities could be reduced by virtue of the possible use of "standardized labeling formats" to disclose network management techniques.[54] However, in the *Net Neutrality Order*, the Commission declined to mandate a standardized approach. Likewise, in 2009, the Commission advised OMB that the burden on small entities would be minimal

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51 *Id*.

52 *Net Neutrality Order* at ¶ 166. The Commission also argues that small providers will be protected because "the rule gives providers adequate time to develop cost-effective methods of compliance." *Id*.

53 *Id*. at ¶ 56 ("We believe that at this time the best approach is to allow flexibility in implementation of the transparency rule, while providing guidance regarding effective disclosure models.").

54 *2009 FCC Supporting Statement* at 2.

because it expected manufacturers to create "standardized disclosure forms."[55] The Commission did not, however, explain how network equipment manufacturers could help small broadband providers with such disclosures as device attachment rules, security measures, impact of specialized services, commercial terms, and the like.

IV. CONCLUSION.

In adopting its "transparency" rule and associated information collection requirements, the Commission did not adhere to its responsibilities under the PRA.

Respectfully submitted,

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[55] *Id.*